JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On September 6, 2012 23-year-old Sûreté du Québec Constable Katia Hadouchi was killed in a single vehicle crash while responding to a domestic violence call in Saint-Ambroise-de-Kildare.

Her patrol car left the roadway as she traveled on Kildare Road at approximately 7:00 pm.

Constable Hadouchi had served with the Sûreté du Québec for two years.

Source: Officer Down Memorial Page available at www.odmp.org/canada

On October 6, 2012 33-year-old Sûreté du Québec Constable Donovan Lagrange succumbed to injuries sustained the previous day when he was struck by a vehicle on Highway 640, near Bois-de-Filion, at approximately 2:00 pm.

He had pulled over two vehicles for speeding and was walking back to his patrol car, which was parked in front of the vehicles, when he was struck. A fourth vehicle struck both of the cars he had pulled over and then struck him, throwing him approximately 30 meters.

Constable Lagrange had served with the Sûreté du Québec for nine years. He is survived by his wife.

Source: Officer Down Memorial Page available at www.odmp.org/canada

"They Are Our Heroes. We Shall Not Forget Them."

inscription on Canada's Police and Peace Officers' Memorial, Ottawa

Highlights In This Issue

National Library of Canada Cataloguing in Publication Data

Main entry under title:

In service: 10-8. -- Vol. 1, no. 1 (June 2001)

Monthly

Title from caption.

"A newsletter devoted to operational police officers across British Columbia."

ISSN 1705-5717 = In service, 10-8

1. Police - British Columbia - Periodicals. 2. Police - Legal status, laws, etc. - Canada - Cases - Periodicals. I. Justice Institute of British Columbia. Police Academy. II. Title: In service, 10-8. III. Title: In service, ten-eight.

Unless otherwise noted all articles are authored by Mike Novakowski, MA, LLM. The articles contained herein are provided for information purposes only and are not to be construed as legal or other professional advice. The opinions expressed herein are not necessarily the opinions of the Justice Institute of British Columbia. "In Service: 10-8" welcomes your comments or contributions to this newsletter. If you would like to be added to our electronic distribution list go to **www.10-8.ca** to subscribe.

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

The Justice Institute of British Columbia Library is an excellent resource for learning. Here is a list of its most recent acquisitions which may be of interest to police.

59 seconds: change your life in under a minute.
Richard Wiseman.
Toronto, ON: Vintage Canada, 2010.
BF 637 S8 W548 2011

Care and candor [videorecording]**: making performance appraisals work.**
Coastal AMI; [Virginia Beach, VA: Coastal Training Technologies Corp., c2006.
1 DVD-ROM (ca. 53 min.)
Presents strategies for conducting performance appraisals including preparation, separating the person from the behavior, setting goals, and using appropriate praise.
HF 5549.5 R3 C37 2006 D536

Change anything: the new science of personal success.
Kerry Patterson et al.
New York, NY: Business Plus, 2011.
BF 637 C4 C42 2011

Cyber bullying [videorecording].
Edmonton, AB: Native Counselling Services of Alberta; University of Alberta, Faculty of Extension, c2012.
1 videodisc (DVD) (23 min.) : sd., col. ; 4 3/4 in.
This documentary provides a rare glimpse into the kind of bullying that takes place online. It explores how technology and changes in communication have affected how kids relate to each other in a world where hurtful information can become public in an instant. This program follows the experiences of four youth and includes interviews with Canadian expert Dr. Shaheen Shariff.
HV 6773.2 C925 2012 D1474

Design for how people learn.
Julie Dirksen.
Berkeley, CA: New Riders, 2012.
LB 1060 D57 2012

The emotional life of your brain: how its unique patterns affect the way you think, feel, and live- and how you can change them.
Richard J. Davidson with Sharon Begley.
New York, NY: Hudson Street Press, c2012.
BF 531 D33 2012

The end of leadership.
Barbara Kellerman.
New York, NY: Harper Business, c2012.
HD 57.7 K447 2012

Enhancing adult motivation to learn: a comprehensive guide for teaching all adults.
Raymond J. Wlodkowski.
San Francisco, CA: Jossey-Bass, A Wiley Imprint, c2008.
LC 5219 W53 2008

First-time leaders of small groups: how to create high-performing committees, task forces, clubs, and boards.
Manuel London, Marilyn
London. San Francisco, CA: Jossey-Bass, c2007.
HM 736 L66 2007

Groupthink [videorecording].
written & directed by Kirby Timmons; produced by Melanie Mihal.
Carlsbad, CA: CRM Films, c1992.
1 videodisc (ca. 25 min.) : + 1 leader's guide (12 p.)
The late Dr. Irving Janis first coined the term groupthink, a natural tendency to achieve agreement for the sake of group unity despite contrary facts and potentially dangerous consequences. Historical events are used to demonstrate the importance of group decisions. Group interactions that led to the space shuttle, Challenger, disaster of 1986 are probed in depth. An interview with Janis and a detailed analysis of the eight symptoms of groupthink are also included.
HD 30.23 G78 1992 D529 (Restricted to in-house.)

Handbook of adult and continuing education.

edited by Carol E. Kasworm, Amy D. Rose, Jovita M. Ross-Gordon.

Los Angeles, CA: SAGE, c2010.

LC 5251 H28 2010

The handbook of experiential learning.

edited by Mel Silberman.

San Francisco, CA: Pfeiffer, c2007.

LB 1027.23 H36 2007

The leadership challenge [sound recording].

James M. Kouzes, Barry Z. Posner.

New York, NY: Gildan Media, p2007.

Two experts in leadership skills share their insights and stories on what it means to be in charge, offering a workshop for those interested in improving their management skills.

HD 57.7 K68 2007

Managing conflict with direct reports.

Barbara Popejoy and Brenda J. McManigle. Greensboro, NC: Center for Creative Leadership, c2002.

HD 42 P66 2002

Leaders make the future: ten new leadership skills for an uncertain world.

Bob Johansen; foreword by John R. Ryan.

San Francisco, CA: Berrett-Koehler Publishers, c2012.

HD 57.7 J635 2012

The power of habit: why we do what we do in life and business.

Charles Duhigg.

Toronto, ON: Doubleday Canada, c2012.

BF 333.5 D83 2012

Positive discipline [videorecording]**: how to resolve tough performance problems quickly...and permanently.**

presented by CRM Learning;produced and directed by Timothy Armstrong.

Carlsbad, CA: CRM Learning, c2006.

1 videodisc (ca. 25 min.): + 1 leader's guide (61 p.) + 1 participant workbook (14 p.) + CD-ROM + reminder cards.

Based on the book: Positive discipline / by Eric Harvey, Paul Sims.

Dallas, TX: Walk the Talk Company, c2005. ISBN 1885228627

Training program for supervisors, using dramatizations of performance issues and how to solve them through positive discussion, not punitive action. It follows a five-step process for correcting negative performance which includes: identify the problem; analyze the problem's severity; discuss the problem; document the discussion; and follow-up and monitor results.

HF 5549.5 L3 P67 2006 D526

Powerful conversations: how high-impact leaders communicate.

Phil Harkins.

New York, NY: McGraw-Hill, c1999.

HD 30.3 H371 1999

Public speaking: an audience-centered approach.

Steven A. Beebe, Susan J. Beebe.

Boston, MA: Pearson Allyn & Bacon, c2012.

PN 4129.15 B43 2012

Scenes of compassion: a responder's guide for dealing with emergency scene emotional crisis.

by Timothy W. Dietz.

U.S.: Behavioral Wellness Resources Pub., 2009.

RC 451.4 D565 2009

Social intelligence: the new science of success.

Karl Albrecht.

San Francisco, CA: Jossey-Bass; Chichester: John Wiley [distributor], 2009.

HM 1106 A43 2009

Sourcebook on violence against women.

edited by Claire M. Renzetti, Jeffrey L. Edleson, Raquel Kennedy Bergen.

Los Angeles, CA: SAGE Publications, c2011.

HV 6250.4 W65 S68 2011

Think smart: a neuroscientist's prescription for improving your brain's performance.

Richard Restak.

New York, NY: Riverhead Books, 2009.

QP 398 R47 2009

CONTENTS POSSESSION MORE THAN OPERATING VEHICLE

R. v. Lincoln, 2012 ONCA 542

The accused, who was on probation, was stopped driving a rental vehicle. Upon further investigation police discovered cocaine under the car's steering column and $800 cash in his wallet. He was charged with several offences including possessing cocaine for the purpose of trafficking (PPT), possessing proceeds of crime and breach of probation.

Ontario Court of Justice

The judge held there was sufficient evidence of knowledge and control of the cocaine to justify a finding of possession. In doing so, the judge concluded that anything found in the vehicle was *prima facie* in the accused's *de facto* possession. As its operator, the accused had control of the vehicle and was considered to have control of its contents unless there was evidence indicating otherwise. He was convicted of the offences.

Ontario Court of Appeal

The accused successfully appealed the lower court's ruling. The trial judge improperly applied a presumption that deemed the accused, as the vehicle operator, to have knowledge and control of its contents in the absence of evidence to the contrary. "No rebuttable presumption of knowledge and control for purposes of determining possession, based solely on the fact that a person is the operator with control of the vehicle, exists at common law or under the Controlled Drugs and Substances Act," said the Court of Appeal. "To give effect to such a premise would constitute an impermissible transfer of the Crown's burden of proof to the accused. While the fact that a person is the operator with control of the vehicle, together with other evidence, may enable a trial judge to infer knowledge and control in appropriate cases, it cannot, standing alone, create such a rebuttable presumption." The accused's PPT conviction was set aside.

"No rebuttable presumption of knowledge and control for purposes of determining possession, based solely on the fact that a person is the operator with control of the vehicle, exists at common law or under the Controlled Drugs and Substances Act."

Further, because the charge of possessing the $800 knowing that it was obtained from the proceeds of crime flowed from the PPT charge, the trial judge applied the same sort of rebuttable presumption reasoning, concluding that there was no evidence to the contrary indicating possession of the currency for any other purpose. This conviction was also set aside as was the conviction for breach of probation, since it was founded on the PPT and proceeds of crime convictions. The accused's appeal was allowed, all his convictions were set aside and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

SUBJECTIVE BELIEF FOR SAMPLE SUFFICIENT: OFFICER 'KNEW' ASD FAIL MEANT OVER .08

R. v. Harrison, 2012 BCCA 339

As he followed a vehicle from a bar, a police officer observed it negotiate a curve in a manner that he felt was abnormal. He pulled it over. Before exiting the vehicle on request, the driver stuffed her mouth full of potato chips. The officer smelled liquor on her breath and noted her face was flushed and she had bloodshot eyes. A second officer arrived on scene and administered an approved screening device (ASD) test and the accused failed. The first officer, with the knowledge the accused had failed the ASD test, then read a breath demand as follows:

> I have reasonable grounds to believe that you are committing, or within the preceding three hours have, as a result of the consumption of alcohol, committed an offence under s. 253 of the Criminal Code, and I hereby demand that you provide, as soon as is practicable, such samples of your breath as are necessary to enable a proper analysis to be made to determine the concentration, if any, of alcohol in your blood and to accompany me for the purpose of enabling such samples to be taken.

British Columbia Provincial Court

The judge found the officer demanding the breath sample had the results of the ASD passed onto him. The officer testified he "knew" the accused had an alcohol level over the .08 limit. In the judge's view, this was sufficient to constitute reasonable and probable grounds for a belief that the accused had committed an offence under s. 253 of the *Criminal Code*. The breathalyzer demand followed and the accused refused to provide a sample. She was convicted.

British Columbia Supreme Court

The accused argued the police officer who made the breath demand did not hold the necessary subjective belief that an offence was committed under s. 253 for the purposes of making a demand under s. 254(3). The appeal judge agreed. "Nowhere in his evidence does [the officer] give the opinion that the results of the ASD test constituted reasonable and probable grounds for his belief that [the accused] had committed an offence contrary to s. 253 of the Code," he said. Therefore, the demand was invalid since there was no evidence of the demanding officer's subjective opinion, an essential element of a demand. The accused's conviction was overturned and an acquittal was entered.

British Columbia Court of Appeal

The Crown submitted, in its view, that there was evidence to support the required opinion or subjective belief that the accused was committing an offence. The officer knew the accused had a blood alcohol level above the legal limit because he knew the failed ASD test meant a blood alcohol level over .08. Plus, the breath demand included the statement that the officer had the required belief. The accused, on the other hand, submitted that the officer never gave the required opinion.

Examination in chief

Crown: Officer ... what was your understanding of what a fail meant on an approved screening device?

Officer: A fail meant to me that the individual who had – that the ASD had detected alcohol present in their system and that it was above – it was over the .08 limit, well over, at that point.

Crown: When you say alcohol in her system, do you mean just what part of their system was the alcohol in, your understanding?

Officer: That there's alcohol present in their – in their – in their body at that point. That was – I knew that they had consumed alcohol and that it was in a concentration greater than 80 milligrams percent, and I knew that – like, now I know that it's greater than 99 milligrams percent, but at the time, I – I just knew that it was well above.

Justice Saunders, speaking for the Court of Appeal, found the appeal judge erred and "relied heavily upon the absence of testimony from the police officer (apart from reading the demand) that he held an opinion or belief that an offence had been committed." But he overlooked the officer's testimony that he "knew" an ASD fail meant that the individual had consumed alcohol and that it was in a concentration over the .08 limit:

> Although this police officer was not versed in the technical terminology of blood alcohol levels, it is apparent the officer considered that [the accused] had a blood alcohol concentration over that allowed by s. 253(1)(b) – .08 has no other significance in the context of alcohol related offences. While this evidence would not support a finding of subjective belief for the purposes of s. 253(1)(a) [impaired driving], it does support such a belief of an offence under s. 253(1)(b) [over 80 mg%]. It was open, in my view, to the judge to interpret this evidence as evidence the officer "knew" the concentration of alcohol was greater than permitted by the Criminal Code. Rather than use the words

> "opinion" or "belief", he used the stronger, more certain word, "knew". In my view, it was open to the judge to infer that an officer who "knew" that the alcohol concentration "was over the .08 limit, well over" had a subjective belief that the concentration of alcohol was greater than was permitted by s. 253(1)(b), thus satisfying that aspect of s. 254(3). [para. 14]

The Crown's appeal was allowed, the accused's acquittal was set aside and the conviction for refusing to provide a breath sample was restored.

Complete case available at www.courts.gov.bc.ca

REASONABLE GROUNDS LESS THAN PRIMA FACIE CASE

R. v. Gunn, 2012 SKCA 80

A police officer observed a vehicle being operated in an erratic manner late at night when bars were closing. It sat at a four-way stop sign with the right of way for six to eight seconds and seemed to wait for the officer to go first. The vehicle made an awkward right hand turn, almost went up onto a curb, failed to straighten out immediately afterwards and drove for some time down the middle of the road. The vehicle appeared to be driven without a destination or to avoid the officer. It drove onto a side street and then turned around and retraced its route. The officer suspected the driver might be impaired and stopped the vehicle. The accused exhibited physical symptoms of alcohol impairment - glassy and bloodshot eyes, slurred speech and an odour of liquor on his breath. These symptoms confirmed the officer's suspicion such that he felt he had sufficient grounds to demand a breathalyzer sample under to s. 254(3) of the *Criminal Code*. The accused was arrested for impaired driving and a breath samples were demanded. When walking to the patrol car the officer noticed that the accused's movements were slow and deliberate and he seemed to be concentrating on walking. At the police station he provided breath samples that were twice the legal limit. He was charged with driving while impaired, driving while over 80mg% and driving while disqualified.

Saskatchewan Provincial Court

At trial the judge found the accused had been arbitrarily detained under s. 9 of the *Charter* by the investigating officer during the roadside stop. Although he concluded that the officer had reason to be suspicious that the accused's ability to operate a vehicle might be impaired by alcohol, the officer lacked the objective basis to elevate that suspicion to the level of reasonable grounds for belief. In his view, the officer provided no evidence of post-arrest signs of impairment, failed to conduct roadside investigative tests and found alternate inferences or explanations other than impairment for the accused's behaviour. So even though the officer honestly believed the accused was impaired, the belief was not objectively sustainable. The Certificate of Analyses was excluded as evidence under s. 24(2) of the *Charter* and the accused was acquitted of impaired driving and over 80mg%. However, he was convicted of driving while disqualified and given a one year driving suspension.

Saskatchewan Court of Queen's Bench

The Crown appealed, arguing there was no arbitrary detention. But the appeal judge upheld the trial judge's ruling. He too found the officer had only a reasonable suspicion the accused had alcohol in his body but that the factual basis was not strong enough to support the officer having reasonable and probable grounds to make a breath demand. The accused's acquittal was upheld.

Saskatchewan Court of Appeal

The Crown again challenged the lower courts' rulings. The Crown alleged that the appeal judge erred in assessing the reasonableness of the investigating officer's belief that the accused was impaired. In starting the Court's analysis, Justice Caldwell, delivering the unanimous judgment, first examined the legal standard of "reasonable grounds to believe":

A police officer may not demand a breath sample of an individual unless the officer has "reasonable grounds to believe" the individual has, within the preceding three hours, driven while impaired or while over the proscribed limit. This means the officer must subjectively (or honestly) believe the individual has driven while impaired or "over .08" within the preceding three hours and that belief must be rationally sustainable on an objective basis. This does not mean that the Crown has to demonstrate a prima facie case for conviction, let alone prove its case beyond a reasonable doubt; rather, the standard of "reasonable grounds to believe" is one of lesser probability which simply requires the reviewing court to determine whether the factors articulated by the officer who made the breath-demand were reliable and were capable of supporting the officer's belief that the individual had driven while impaired or "over .08" within the preceding three hours.

Where an individual challenges the validity of a breath-demand on the basis that the police officer's belief was not reasonable, the question for the trial judge is whether, on the whole of the evidence adduced, a reasonable person standing in the shoes of the officer would have believed the individual's ability to operate a motor vehicle was impaired. This is a question of law and a trial judge's answer to it is measured on appeal against the yardstick of correctness.

When determining whether the standard of "reasonable grounds to believe" has been met, it is important to keep in mind that a police officer need only believe an individual's ability to drive is slightly impaired. ... [F]or the purposes of s. 253(1)(a) of the Criminal Code, an impaired ability to operate a vehicle may be established where the Crown proves any degree of impairment from slight to great. As such, the precondition to an officer's authority to make a breath-demand may be satisfied where, objectively speaking, an officer has reasonable grounds to believe an individual's ability to drive is even slightly impaired by the consumption of alcohol.

"When determining whether the standard of "reasonable grounds to believe" has been met, it is important to keep in mind that a police officer need only believe an individual's ability to drive is slightly impaired."

Given the standard to be met, any inference useful to a police officer when attempting to satisfy it must logically tend to support either (a) a belief that the individual has driven within the preceding three hours, or (b) a belief that the individual's ability to operate a vehicle is impaired or that the individual is "over .08". The fact an individual has operated a motor vehicle is, usually, readily established on the evidence without recourse to inferences of fact. However, an impairment assessment necessarily calls for the officer to draw one or more inferences from his or her own observations and the surrounding circumstances. Where the reasonableness of the officer's belief is challenged in court, the officer must be in a position to clearly articulate sufficient observations and to point to other evidence which would rationally and reliably sustain the officer's belief of impairment on an objective basis. [references omitted, para. 7-10]

And further:

> In a voir dire held to determine the reasonableness of the police officer's belief, the trial court must consider whether the observations and circumstances articulated by the officer are rationally capable of supporting the inference of impairment which was drawn by the officer; however, the Crown does not have to prove the inferences drawn were true or even accurate. In other words, the factors articulated by the arresting officer need not prove the accused was actually impaired. This is so because that is the standard of proof reserved for a trial on the merits (i.e., proof beyond a reasonable doubt). [para. 15]

In this case, Justice Caldwell found the Crown had been held to proving an overly onerous standard beyond "reasonable grounds to believe" to one of proving a prima facie case or possibly even beyond a reasonable doubt.

Post-Arrest Signs of Impairment

The Court of Appeal rejected the notion that post-arrest signs of impairment are required in assessing

the objective reasonableness of an officer's belief. "The assessment of the reasonableness of this belief must be centred around the factors which actually led the officer to conclude there were reasonable grounds to believe [the accused's] ability to operate a vehicle was impaired thereby satisfying the standard imposed under s. 254(3) of the Criminal Code," said Justice Caldwell. "Therefore, albeit that the initial evidentiary burden is on the accused [to prove a Charter violation], the Crown must, of necessity, adduce evidence tending to substantiate the reasonableness of its officer's belief." He continued:

> [W]hile it would be helpful, the Crown is under no legal obligation to proffer evidence to establish that the arresting officer has continued to observe signs of impairment after he or she has formed the subjective belief that the s. 254(3) standard had been met (i.e., presumably, prior to the time the officer arrested the accused or made the demand). Axiomatically then, the fact the Crown has not adduced post-arrest or demand evidence of impairment from the arresting officer does not serve to undermine the reliability of the officer's pre-arrest or demand belief. While evidence of the existence or lack of post-arrest or demand signs of impairment may certainly assist in the assessment of the reliability of the officer's belief, the absence of evidence can be of no assistance."

Roadside Investigative Tests

The Court of Appeal also found that sobriety tests or roadside screening tests are not a requirement to reasonable grounds. While it would have been prudent for the investigating officer to have conducted roadside sobriety and alcohol screening device tests they are not a necessity:

> A roadside screening test may be conducted on the standard of "reasonable suspicion". If a "fail" results from the use of a roadside screening device, the officer may use that information when forming a belief that the individual's ability to operate a vehicle is impaired by alcohol for the purposes of arrest or a breath demand. The evidence of a "fail" result is also strong objective evidence which will assist the court in its after-the-fact assessment of the reliability of the officer's belief. However, if the officer already believes he or she has objectively-sustainable grounds to arrest or to make a breath-demand, then the conduct of a roadside screening device test, while prudent and easily-arranged, is not strictly necessary. The same can be said for sobriety tests. What I mean to say here is that while each type of roadside-test will certainly permit the arresting officer and the courts to better ascertain the objective reasonableness of the officer's subjective belief, it cannot be said that the conduct of any such test is intrinsic to an objectively reasonable belief of impairment. This is so because the Crown can and has often successfully met an accused's challenge (it certainly did so before the advent of roadside screening devices) through sufficiently compelling evidence of the arresting officer's observations and the surrounding circumstances which objectively supports the reasonableness of the officer's belief. Accordingly, by holding the Crown to either proffer evidence of the results of roadside investigatory tests or to satisfactorily explain why it has not done so, a court mistakenly elevates the evidentiary and persuasive burden imposed on the Crown and, thereby, holds the Crown to establish its case on more than a standard of reasonable grounds to believe. [para. 21]

"A roadside screening test may be conducted on the standard of "reasonable suspicion". If a "fail" results from the use of a roadside screening device, the officer may use that information when forming a belief that the individual's ability to operate a vehicle is impaired by alcohol for the purposes of arrest or a breath demand.

Inferences & Alternate Explanations

While there may well have been rational alternative, innocent or innocuous explanations for each of the observations which led the officer to draw the negative inference that the accused's ability to operate a vehicle was impaired by alcohol, this did not render the officer's inferences that objectively supported his belief unreliable. "The standard of 'reasonable grounds to believe' does not require that the arresting officer be in the position to dispel

innocent or innocuous inferences which might also be reasonably drawn from his or her observations," said Justice Caldwell. But he also cautioned:

> This is not to say that the availability of other rational inferences is irrelevant; rather, the fact innocent or innocuous inferences may be rationally drawn from the circumstances may, depending on the soundness or cogency of those inferences, serve either to undermine or to reinforce the reliability of the inference of impairment drawn by the officer; but this requires factual determinations to underpin the inferences, a judicial assessment of the reliability of the inferences drawn and then the weighing of conflicting inferences in context and against the soundness and cogency of the officer's inference of impairment, which did not occur here. [para. 23]

In conclusion, the lower courts misapprehended the burden of proof imposed on the Crown and the legal standard of 'reasonable grounds to believe'. However, the Court of Appeal could not determine whether the investigating officer had or did not have grounds to make the breath demand. Thus, the Crown's appeal was allowed, the accused's acquittal was set aside and a new trial was ordered. The issue of whether reasonable grounds existed was left to a new trial judge after rehearing the evidence.

Complete case available at www.canlii.org

DETAINEE MUST EXPRESS DESIRE TO SPEAK WITH LAWYER

R. v. Fuller & White, 2012 ONCA 565

Following a joint forces operation dubbed "Project Ulverston" police believed that four suspected drug dealers were living at a two story residence. Police obtained a search warrant for the suspects' residence to be executed in the middle of the night. One of the four bedrooms on the main floor belonged to the accused Fuller and a bedroom in the basement belonged to the accused White. But neither of these two men were any of the four targeted suspects. Four police officers executed the warrant at about 3:40 am while the men were sleeping. On entering the house, the lead investigator smelled a strong odour of marijuana and saw a bong on the kitchen table. Four occupants, including Fuller, were detained in the living room of the main floor for conspiracy to possess marijuana for the purpose of trafficking. They were advised of their right to counsel and cautioned about making statements. Each indicated they understood and declined to call a lawyer at that time. White was found in his basement bedroom and was advised of his right to counsel and told he had the right to say nothing. He was also cautioned about making a statement and answered "not now" when asked if he wished to call a lawyer.

White told police there was "just some weed and mushrooms in the closet", but police found a small safe in it. White said Fuller had the key to the safe. When asked for the key, Fuller initially denied knowing where it was but eventually produced a set of keys from a desk drawer in his bedroom. Fuller said the safe belonged to both him and White, and told the officer there was "a bit of weed inside." Police also found another key to the safe on a set of White's keys police located in his bedroom. When the safe was opened police found baggies, packaging materials, a digital scale, $80, bags containing 440.92 grams of marijuana, a bag containing 207.9 grams of psilocybin and a film canister containing 9.6 grams of cannabis resin. The men were arrested, taken to the police station, re-read their rights and offered an opportunity to contact counsel. They were charged with possession and possession for the purpose of trafficking.

Ontario Court of Justice

The trial judge found the police told the accuseds about their right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel - thereby complying with the informational obligation under s. 10(b) of the *Charter* - but breached the implementational component. The judge then went on to exclude the accuseds' statements admitting they had marihuana and magic mushrooms stashed in the safe under s. 24(2). They were acquitted.

"The police's implementational obligations arise only when detainees express a wish to exercise their right to counsel."

Ontario Court of Appeal

The Crown challenged the trial judge's ruling contending that he erred in finding that the implementation component of the s. 10(b) right had been breached. Justice Laskin, speaking for the Court of Appeal, agreed. "The guarantee of the right to counsel in s. 10(b) of the Charter imposes three obligations on the police – the first is informational and the second and third are implementational," he said. "The police's implementational obligations arise only when detainees express a wish to exercise their right to counsel." Thus, the police must first inform a detainee of their right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel. Then, if the detainee indicates a desire to exercise this right, the police must (1) provide them with a reasonable opportunity to do so (except in urgent and dangerous circumstances) and (2) refrain from eliciting evidence from the detainee until they have had a reasonable opportunity (except in cases of urgency or danger).

In this case, the police met their informational obligation - they told the men about their right to counsel. The implementational obligations, however, are only triggered when a detainee indicates a desire to exercise the right to counsel. But there was no evidence from any witness that either accused Fuller or White asked for a lawyer or indicated a desire to speak to one. The trial judge erred in finding a breach of s. 10(b) and his ruling excluding the statements could not stand. The Crown's appeal was allowed, the accused's acquittals were set aside and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"Don't judge each day by the harvest you reap but by the seeds that you plant." - Robert Louis Stevenson

KNOCK & ANNOUNCE & BREAK-IN-THE-DOOR-IF-NO-ANSWER RULE

R. v. Pan & Ban, 2012 ONCA 581

Police obtained a search warrant for a house where they believed there was a marijuana grow operation. They went to the house, knocked repeatedly and announced that they were the police with a warrant. No one answered and, after waiting 30 to 40 seconds, the police rammed open the door with a bettering ram and entered the house. Inside they found 1,370 marijuana plants and arrested two people inside, including the accuseds Ban and Pan. Both were charged with production of marijuana, possession for the purpose of trafficking in marijuana and theft of electricity.

Ontario Court of Justice.

The judge stayed the charges against Ban, in part, on the ground that the police had breached the knock-and-announce rule. As for the search, the judge found it was not conducted reasonably under s. 8 of the *Charter*. In his view, the police conducted a "dynamic entry" without any grounds to do so. "The failure of someone to answer the door within 60 seconds, when one expects fans to be running is not an exigency that justifies a dynamic entry," he said. "The knock-and-announce rule is not a knock-and-break-in-the-door-if-no-answer rule. It means that non-violent execution of the warrant must be attempted."

Ontario Court of Appeal

The Crown argued that the trial judge erred in holding that the police did not comply with the knock-and-announce rule. Justice

Laskin, authoring the Court of Appeal's judgment, agreed:

> Unless exigent circumstances exist, the police must knock and announce their presence before entering a home. The knock-and-announce rule has been part of our law for over 400 years. ...
>
> The rationales for the rule are well known: the protection of the dignity and privacy interests of the occupants of the house, and the enhancement of the safety of the police and the public. [paras. 35-36]

So although there were no exigent circumstances that would justify a departure from knocking-and-announcing, the police nonetheless did comply with the rule. They gave notice of presence (they knocked several times), notice of authority (they announced who they were) and notice of purpose (they stated their reason for being there – to execute a search warrant). Justice Laskin concluded that the knock-and-announce rule is a knock-and-break-in-the-door-if-no-answer rule. "If the police receive no answer, they are entitled to force entry into a home," he said. Since the police did not depart from the knock-and-announce rule and complied with its three components, the judge erred in holding that the Crown was required to justify why police departed from it.

> "Unless exigent circumstances exist, the police must knock and announce their presence before entering a home. The knock-and-announce rule has been part of our law for over 400 years."

However, the knock-and-announce rule also requires the police to give the occupants of a home a reasonable amount of time to answer. The police must properly implement the knock-and-announce rule by waiting long enough before forcing entry. In this case, the Court of Appeal would let a judge at a new trial decide whether the 30 to 40 seconds the police waited was a reasonable amount of time before entering.

Justice Laskin also opined that "even if [police] did depart from the knock-and-announce rule – by, for example, not waiting long enough before forcing entry into the home – that departure would hardly be so egregious that it would turn this case into one of those exceptional cases requiring a stay." Since the trial judge erred in principle and exercised his discretion unreasonably in staying the charges, Ban's stay was set aside and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

Knock-and-Announce Rule

Except in exigent circumstances, the police must knock-and-announce their presence before entering a dwelling house. In doing so, the police must give:

1. ***NOTICE OF PRESENCE*** by knocking or ringing the door bell;
2. ***NOTICE OF AUTHORITY*** by identifying themselves as law enforcement officers; and
3. ***NOTICE OF PURPOSE*** by stating a lawful reason for entry.

+ wait a reasonable amount of time to give occupants time to answer before entering.

LIMITATION ON RIGHT TO COUNSEL STILL APPLIES TO ASD DEMANDS DESPITE CHANGES

R. v. Jaycox, 2012 BCCA 365

The accused drove up to and through a police roadblock without stopping. She was pursued for a short time and pulled over. A strong smell of alcohol was detected and signs of impairment were noted. Two approved screening device (ASD) demands were made but the accused refused to provide a breath sample on both occasions, even though the jeopardy she would face if she failed to comply was explained to her. The accused was then detained for refusing to comply with an ASD demand and impaired driving, and was informed of her *Charter* rights. She asked to speak to counsel and did so when she was taken to the police detachment. After obtaining legal advice, the

accused advised the police that she had been mistaken and now wanted to provide a breath sample. She was told it was too late to do so and was charged with impaired driving and failing to comply with an ASD demand.

British Columbia Provincial Court

The judge acquitted the accused on the impaired driving charge because the evidence was insufficient. As for the failure to comply with the ASD demand, the jude ruled the demand was unconstitutional. Prior to the July 2, 2008 amendment to the ASD demand provision, an officer could only make an ASD demand in circumstances where the officer reasonably suspected a person had alcohol in their body at the time of the demand and they also had alcohol in their body at the time of driving. An immediate temporal connection to the suspicion and the driving was required. Now, however, the ASD demand provision authorizes a demand where the officer reasonably suspects that a person has alcohol or a drug in their body and has operated a motor vehicle within the previous three hours. There is no requirement for the officer to also suspect the person had alcohol in their body at the time of driving. The judge found the new wording "allows a search or seizure in circumstances where there is no reason to think that the results will provide evidence that an offence had been committed." He then read an amendment into s. 254(2) to remedy its constitutional flaw. In this case there were no reasonable grounds to suspect an offence had occurred. The demand was unlawful, contrary to s. 8 of the *Charter* and could not be saved under s. 1.

The judge also found that a person required to provide a breath sample for an ASD analysis is detained and has the right to counsel under s. 10(b), which could not be limited under s. 1. This was different than case law under the previous legislation where the limitation on the right to counsel had been found to be justified because of the policy behind the demand and the practical need to obtain a breath sample quickly. "The legislative objective of s. 254(2) is now outweighed by the abridgement of s. 10(b) rights, given that a refusal to provide a breath sample, in the circumstances set out in the new punishment sections of 255 (2.2) and (3.2), can result in respective punishments of up to 10 years, and life, imprisonment," said the judge. Since the ASD demands the accused had refused were unlawful when they were made, her refusal to comply with them was not unlawful. The accused's refusal was excluded under s. 24(2) of the *Charter* for the s. 10(b) breach and she was acquitted.

British Columbia Supreme Court

A Crown appeal was successful. The appeal judge found the trial judge had jurisdiction to read in an amendment to remedy the constitutional flaw in s. 254(2) but that he erred in failing to apply s. 254(2), as judicially amended, to the accused's circumstances. The trial judge also erred in concluding that the demand was unlawful and that the refusal was not. Plus, he mistakenly found the accused's s. 10 (b) right to counsel was violated and also erred in excluding evidence of her refusal under to s. 24(2). The accused's acquittal was set aside and a guilty verdict was entered.

British Columbia Court of Appeal

The accused appealed, contending that the 2008 amendments significantly overhauled the ASD demand provisions such that the implicit suspension of the s. 10(b) *Charter* right formerly recognized no longer applied to the current wording of s. 254(2). She also submitted that the advent of a 24-hour duty counsel system and the ubiquity of cellular telephones have altered the landscape addressing the concern regarding changes to blood alcohol that might occur during a lengthy delay in contacting counsel. In her view, the earlier justification for suspending the right to counsel resulted from the roadside screening test being administered forthwith at the place where the motorist was stopped and the prompt testing was necessary having regard to the overall two hour time limit, if the scheme was to work. But now, with the new amendments, the subject of the demand can be anyone reasonably suspected of driving or operating a vehicle (including those who did not actually drive or operate a vehicle) within the preceding three

hours. Further, although the testing must still be forthwith, the time and place of the demand can now be within three hours of the suspected driving at any location where the suspected driver or operator is located and there need no longer be a logical connection between the time of the demand and any overall two hour time limit.

Justice Hinkson, however, found the advent of 24-hour duty counsel, the widespread access to cellular telephones, nor any of the differences pointed out by the accused did not change the applicability of a limitation on the right to counsel following the 2008 amendments. Nor is a temporal link between the consumption of alcohol and the alleged driving required:

> I do not accept [the accused's] contention that the Thomsen suspension of the right to counsel "forthwith" depends upon a temporal link between the consumption of alcohol and the alleged driving, nor to the two or three hour time limits applicable to evidentiary breath demands and blood alcohol presumptions. Rather, the right to counsel is suspended under Thomsen and its progeny ... because of the brevity of the detention and the obligation of the detainee to provide a sample "forthwith". The requirement that a breath sample be provided "forthwith" is, from a pragmatic point of view, incompatible with the exercise of a right to counsel before responding to the demand, particularly if the testing is to interfere as little as possible with the flow of traffic, of both drivers subjected to demands, and of other vehicles using the roads.
>
> Moreover, ... the two and now three hour limits relate to the presumptions upon which the Crown may rely in s. 258 of the Code, but not to the admissibility of the breath sample evidence, and in the result, I conclude that the change from a two to a three hour limit does not affect the applicability of the Thomsen suspension of the right to counsel. [paras. 45-46]

The Court of Appeal also ruled that the implied limitation of the right to counsel under s. 254(2) (ASD demand) was not inconsistent with the lack of such an implied limitation under s. 254(3) (breath demand) where there is an entitlement to advice as to the right of counsel and the exercise of that right.

ASD demand prior to July 2, 2008:

s. 254(2) Where a peace officer reasonably suspects that a person who is operating a motor vehicle or vessel or operating or assisting in the operation of an aircraft or of railway equipment or who has the care or control of a motor vehicle, vessel or aircraft or of railway equipment, whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

ASD demand as amended on July 2, 2008:

s. 254(2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:

(a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and

(b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

ASD demand as amended by judge:

s. 254(2) "If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, *with alcohol or a drug in their body*, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol: ..."

Further, the creation of new offences and the increase in the potential penalties for refusals to provide breath samples did not warrant a departure from the limitation of the right to counsel. These changes did not alter the "forthwith" requirement that is the foundation for the limitation of the right to counsel for an ASD demand. The need for testing remains immediate and investigative in nature. Since the implicit suspension of the s. 10(b) *Charter* right applied to the current wording of s. 254(2) as amended by the trial judge, the accused's appeal was dismissed.

Complete case available at www.courts.gov.bc.ca

RISK OF DANGER NEED NOT RISE TO LEVEL OF PROBABILITY IN CARE OR CONTROL CASES

R. v. Smits, 2012 ONCA 524

A nearby resident found the accused passed out in the back of a van parked on the side of a narrow country road in the morning hours and called police. Police arrived and located the van. It was not running, but its hood was warm to the touch. The officers looked into the van and saw the accused passed out on the rear seat. An officer entered the van through the unlocked driver's side door after knocking but receiving no response. He saw a cell phone flipped open on the driver's seat and the keys were in the ignition. After several attempts to rouse the accused by calling out to him, he awoke. He looked disoriented, was directed to exit the van and stumbled as he got out. He appeared "haggard" and his eyes were bloodshot and glassy, his breath smelled of alcohol and he swayed. He had scabbed cuts around his right eye and on his nose, and his jeans were torn. Describing him as "obviously intoxicated", police arrested him for impaired care or control of a motor vehicle.

In the van police saw a glass of orange juice in the centre cup-holder, a partially empty unsealed bottle of vodka between the two front seats, an open can of Budweiser on the floor in the rear passenger area, an empty Budweiser can underneath the driver's seat and a red duffle bag on the floor with another can of beer on top of it. The van had an opening between the back seat and the front seats where a middle seat may have been removed and a person could move up to the driver's seat from the back seat area with no obstruction. When the tow truck arrived to remove the van, the accused asked the officers to take his cell phone out of it. When they did, it was noted that the phone's battery was almost dead. The tow truck driver was able to start the van with one turn of the key and drove it off the grass onto the roadway without any difficulty. The van had an automatic transmission. The accused was taken to the police station and provided two breath samples, registering 147mg% and 138mg%. He also denied driving the van, instead admitting to sitting in the driver's seat just before he passed out. He said that a friend had driven him to where the van was parked, but the friend had left. He would not provide his friend's name to the police nor would he say who own the van. He insisted that he was just a passenger passed out in the van.

Ontario Court of Justice

At trial the accused conceded he was impaired but argued there was no evidence of a risk that he would have set the vehicle in motion. The trial judge disagreed, finding the accused was in care or control because he may have changed his mind and decided to drive while still impaired. Plus, she held that even if the accused had been trying to wait out the impairment, just "because he was difficult to rouse does not support an inference that he would have remained passed out until he had achieved a state of sobriety and thus not pose a risk to set the motor vehicle in motion while impaired". In her view, there was a concrete and tangible likelihood the accused would have woken up and decided he was going to move the van while he was still impaired. The accused was convicted of care or control while impaired and sentenced to four months in jail followed by two years probation and a three year driving prohibition. He had also pled guilty to breaching his probation by consuming alcohol.

Ontario Superior Court of Justice

The accused argued the trial judge erred in finding that he was in care or control of his motor vehicle. He submitted an individual found asleep in the back seat of a vehicle does not create the public risk that s. 253(1) was designed to prevent and there was no more than a mere possibility that he would have changed his mind and endangered society by choosing to drive while impaired. The appeal judge overturned the conviction and found the Crown failed to prove that the accused had been in care or control of his vehicle. In his view, the trial judge's decision was based on speculation that the accused would still be impaired when he awoke and decided to drive.

"The Crown can establish care or control of a motor vehicle in a variety of ways. Where the statutory presumption is rebutted or is not available on the evidence, as in this case, the Crown can rely on what is commonly referred to as de facto or actual care or control.

Ontario Court of Appeal

The Crown then appealed suggesting the Superior Court judge erred in applying the correct standard of review and substituted his own opinion for that of the trial judge's in deciding whether the accused had care or control of the motor vehicle. Justice Brown, delivering the Court of Appeal's opinion, first reviewed the law regarding care or control:

> The Crown can establish care or control of a motor vehicle in a variety of ways. The first is by relying on the statutory presumption found in s. 258(1)(a) of the Criminal Code. Where an accused is found in the driver's seat, the accused must establish on a balance of probabilities that he or she did not occupy the driver's seat for the purpose of setting the vehicle in motion.
>
> Where the statutory presumption is rebutted or is not available on the evidence, as in this case, the Crown can rely on what is commonly referred to as de facto or actual care or control.
>
> The mens rea for having the care or control of a motor vehicle is the intent to assume care or control after the voluntary consumption of alcohol or a drug. The actus reus is the act of assumption of care or control when the voluntary assumption of alcohol or a drug has impaired the ability to drive. [paras. 47-49]

In this case, the *actus reus* of the offence of care or control was at issue. As was noted in a previous decision (*R. v. Wren* (2000), 144 C.C.C. (3d) 374 (Ont.C.A.)), "in order to establish care or control of a motor vehicle, the act or conduct of the accused in relation to that motor vehicle must be such that there is created a risk of danger, whether from putting the car in motion or in some other way." Proof of a risk of danger is a necessary ingredient to establish the *actus reus* of care or control and three risks of danger have been identified in the cases where an intoxicated individual uses a motor vehicle for a non-driving purpose:

1. The risk that the vehicle will unintentionally be set in motion;
2. The risk that through negligence a stationary or inoperable vehicle may endanger the individual or others; or
3. The risk that the individual who has decided not to drive will change his or her mind and drive while still impaired.

It was the third risk of danger - the "change of mind" ground for care or control - that applied to this case. Justice Brown noted:

> In order to find care or control based on the change of mind ground, the Crown must prove there was risk that the [accused] would have decided to drive while still impaired. The risk does not have to rise to the level of probability. ...
>
> That being said, what risk of danger must exist to establish actual care or control based on the change of mind ground has been the subject of much debate. The topic has generated

"[I]n order to establish that an accused has created a risk of danger in change of mind cases, the Crown must demonstrate a risk that an accused, while impaired, would change his or her mind and put the vehicle in motion."

considerable judicial attention in the courts below. ... [paras. 56-57].

And further:

> Although the courts below have applied different modifiers, what all the authorities, including this court, seem to be saying is that in order to establish that an accused has created a risk of danger in change of mind cases, the Crown must demonstrate a risk that an accused, while impaired, would change his or her mind and put the vehicle in motion. That risk must be based on more than speculation or conjecture. Saying that any person whose ability to operate a motor vehicle is impaired to any degree might change his or her mind is not sufficient. The trier of fact must examine the facts and determine if there is an evidentiary foundation that such risk of danger exists.
>
> I appreciate that this task is not without its challenges because a finding of whether a risk of danger arises in circumstances where an accused is not actually driving requires the trial judge to engage in an assessment of what in all the particular circumstances may occur in the not too distant future. However, that is all part of the fact-finding process for the trier of fact.
>
> Whether a risk of danger arises on the facts is determined by assessing circumstantial evidence. [paras. 60-62]

Relying on an earlier case (*R. v. Szymanski*, 2009 CanLII 45328 (ON SC)), the Court of Appeal cited a list of factors a court might look at when engaging in the risk of danger analysis on the basis of circumstantial evidence:

- The level of impairment, which is relevant to the likelihood of exercising bad judgment and the time it would take for the accused to become fit to drive;
- Whether the keys were in the ignition or readily available to be placed in the ignition;
- Whether the vehicle was running;
- The location of the vehicle;
- Whether the accused had reached his or her destination or if the accused was still required to travel to his or her destination;
- The accused's disposition and attitude;
- Whether the accused drove the vehicle to the location where it was found;
- Whether the accused started driving after drinking and pulled over to "sleep it off" or started using the vehicle for purposes other than driving;
- Whether the accused had a plan to get home that did not involve driving while impaired or over the legal limit;
- Whether the accused had a stated intention to resume driving;
- Whether the accused was seated in the driver's seat regardless of the applicability of the presumption;
- Whether the accused was wearing his or her seatbelt;
- Whether the accused failed to take advantage of alternate means of leaving the scene;
- Whether the accused had a cell phone with which to make other arrangements and failed to do so.

Did the accused's conduct in relation to the motor vehicle create a risk that he, while impaired, would put the vehicle in motion and thereby create a danger? The Court of Appeal found that it was open to the trial judge to conclude that it was so:

> In this case, there was ample circumstantial evidence to support the trial judge's conclusion that the [accused] was in care or control of the van. Her finding that the [accused] would have decided to drive while still impaired was supported by the following:
>
> · The presence of the keys in the ignition and ease with which the van could be put into motion;

· The [accused's] intention to return to his home in Barrie;

· The van's remote location, the lack of available public transportation, and the [accused's] lack of any alternate plan to get home;

· The degree of the [accused's] intoxication, which was such that his judgment was significantly impaired;

· The [accused's] "volatility in mood and response" as evidenced in the DVD, which augmented concerns about his judgment;

· The accessibility of the driver's seat;

· The [accused's] earlier presence in the driver's seat when he contemplated driving. [para. 71]

The appeal judge erred in overturning the accused's conviction. "The findings of the trial judge were based on more than mere speculation," said Justice Brown. "There were a constellation of factors that were relied upon by the trial judge, apart from simply the breathalyzer readings of the [accused], in reaching her conclusion there was a risk of danger sufficient to establish the [accused's] care or control of the motor vehicle." The Crown's appeal was allowed and the accused's conviction and sentence were restored.

Complete case available at www.ontariocourts.on.ca

A NEW SUPREME

On October 5, 2012 the Right Honourable Beverley McLachlin, Chief Justice of Canada, welcomed the appointment by Prime Minister Stephen Harper of Mr. Justice Richard Wagner to the Supreme Court of Canada. "Justice Wagner is a judge of the highest ability, integrity and intellect", said Chief Justice McLachlin. "In addition to his extensive experience on the Bench, he brings a profound expertise in civil and commercial litigation. I look forward to the contribution of this distinguished jurist to the work of the Court."

Justice Wagner, who sat as a judge of the Quebec Court of Appeal, was sworn sworn-in as a judge of the Supreme Court in a private ceremony on October 11, 2012. A formal welcome ceremony will take place on December 3, 2012.

THREAT MUST BE TAKEN SERIOUSLY

R. v. Tutino, 2012 QCCA 889

Two uniformed patrol officers with the Société de Transport de Montréal saw a man in his late forties flip a subway turnstile with his hand and pass through without paying, thereby committing an offence. They both called out to him and asked him to return. The accused, furious at being caught, aggressively kicked the metal fixture holding the turnstile. The officers then asked him to identify himself but he refused on three occasions. He finally complied by giving his health insurance card but told police to "fuck off" when they asked for his address, which was required to complete the statement of offence under the *Code of Penal Procedure*. He then complied, giving them a blue hospital card. They asked him to state his address, but it did not match the one on the card. When asked for his correct address the accused responded by pushing the officer on the chest with his right hand. Both officers then forcibly took the accused face down to the ground and arrested him for assault. He was handcuffed and searched for dangerous objects. The accused then said "If I see your face again, I'm going to kill you." He was then immediately arrested for uttering death threats and re-read his rights. He replied, "I'm going to hit your face with a baseball bat." The accused was charged with two counts of uttering death threats and assault.

Court of Quebec

The judge concluded that the threats directed at the two officers could not have been taken seriously given the context. "I believe that considering the whole context of the arrest, that a reasonable person would not consider that those threats could have been serious just by the fact that they were told," said the judge. "The accused was facing two agents wearing uniforms, who were in a position of authority and who were in force concerning the accused." The accused was acquitted of the uttering threats charges. On the assault charge, the judge expressed uncertainty as to what actually had

happened and whether the accused had in fact pushed the officer or not. The accused was also acquitted on the assault charge.

Quebec Court of Appeal

The Crown appealed the verdicts of acquittal entered by the trial judge on the two counts of uttering death threats and the assault.

Uttering Threats

The Crown argued that the trial judge did not properly consider the relevant factors respecting the uttering death threats charges. But the Court of Appeal disagreed. "It is not sufficient for the words used to constitute a threat to bring about a conviction," said the Court. "Rather, the context in which the words were uttered, and the impact the words would have on the persons to whom they were directed, must be taken into account in assessing whether a criminal offence was committed." So even though there was no doubt that the words the accused pronounced, if looked at in isolation from their context, would constitute a death threat or a threat to cause bodily harm, more was required to engage the accused's criminal liability:

> Here, the trial judge did not render section 264.1(1)(a) Cr. C. inapplicable to suspects who are in the custody of police officers simply because the threat could not be carried out immediately. Instead, she analyzed the facts of the case, and found that the [accused] had lost his self-control, resenting the way in which he had been treated for such a trivial infraction as not paying for his subway ticket, and who had uttered the impugned words in a state of frustration. Moreover, the threats had not been uttered in a way that a reasonable person, in the same circumstances, would have objectively feared for his or life, nor had it been established that the [accused] intended the patrol officers to take them seriously. [para. 14]

"[T]he threats had not been uttered in a way that a reasonable person, in the same circumstances, would have objectively feared for his or life, nor had it been established that the [accused] intended the patrol officers to take them seriously."

Nor did the trial judge find that the threat had to be so serious that it could have been carried out immediately. "All the trial judge did was consider the general context in which the threats were made, namely the fact that the persons to whom the threats were directed were officers in a position of authority, and that the [accused] was in custody when the threats were made," said the Court of Appeal. "This case is no precedent for the view that it is open season on uniformed officers to be recipients of death threats with impunity." The accused's acquittal on the threatening counts was affirmed.

Assault

As for the assault charge, the trial judge did err. "There was consistent, uncontradicted evidence as to the circumstances that resulted in [the officer] being pushed in the chest," said the Court. "Moreover, it is clear that immediately after the assault occurred, the [accused] was forcibly taken to the ground, handcuffed and placed under arrest. There is no plausible explanation in the evidence that suggests any reason other than the assault for the two patrol officers to have acted in that fashion." The judge gave inadequate reasons for holding that there was a reasonable doubt. The accused's acquittal was set aside and a new trial was ordered on the assault charge.

Complete case available at www.canlii.org

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DECLARATION OF OVERAGE AS CONSISTENT WITH INNOCENCE NOT COMMON SENSE

R. v. Ashley, 2012 ONCA 576

The accused arrived at Toronto's Pearson International Airport on a flight home from Jamaica. She was accompanied by her two and a half year old daughter and had several pieces of checked luggage. She was routed to a secondary inspection after declaring an overage of alcohol and several agricultural products. During an inspection by Canada Border Services officers, two of her largest suitcases were found to contain items of produce, including six large compressed balls of cocoa wrapped in cellophane. When the cocoa balls were cut they were found to contain plastic wrapped marihuana weighing 20.2 kg (44 lbs) in total with a value of between $51,175 and $57,850. The accused was arrested and charged with importing.

Ontario Superior Court of Justice

At trial the he Crown alleged that the accused was acting as a drug courier. The accused, on the other hand, provided a long story to explain why she had no knowledge of the contents of her luggage. She said she had been planning to take this trip with her daughter for some time and argued that her declaration of an alcohol overage was indicia of innocence. In her view, as a matter of common sense, it was unlikely a drug importer would knowingly make a declaration that would send her to a secondary inspection. The trial judge flatly rejected the accused's evidence and, in assessing her credibility, took judicial notice that (1) the declaration of an alcohol overage is not uncommon in cases where drugs are found expertly hidden in a traveller's belonging in drug importing cases at Pearson airport and (2) the almost last minute cash payment for the ticket was out of the ordinary and consistent with what is often seen in drug importation cases. The accused was convicted of importing a controlled substance and sentenced to 18-months imprisonment to be served in the community.

Ontario Court of Appeal

The accused contended that the trial judge improperly took judicial notice. This argument, however, was rejected. As for the declaration of the alcohol overage, the trial judge had extensive experienced with similar prosecutions for drug-related offences. The accused's position that declaring an overage was consistent with innocence was not a common sense inference. Plus, the judge did not use the accused's declaration of overage as evidence against her.

As to the last minute cash ticket purchase, it was out of the ordinary. The accused said she had planned to take this trip with her daughter for some time, but common sense would suggest that in those circumstances the tickets would have been purchased during the planning process, not last minute and in cash. It was open to the trial judge to conclude that this conduct was inconsistent with the accused's story and consistent with what is often observed in drug importing cases.

Moreover, the trial judge's reliance on judicial notice for these two factors did not play a significant role in his assessment of the accused's credibility given the abundance of other factors, which were far more devastating to her credibility. The accused's appeal was dismissed and her conviction upheld.

Complete case available at www.albertacourts.ab.ca

'CONVERSATIONAL TOUCHING' NOT OPPRESSIVE IN CIRCUMSTANCES: CONFESSION ADMISSIBLE

R. v. Pappas, 2012 ABCA 221

Following the discovery of a deceased male, who had been shot once in the back and once in the head with a 9 mm handgun, the accused was placed under surveillance. He was seen throwing items into a garbage can outside a 7–11 store and into a

dumpster behind a gas station across the street. Police retrieved the victim's credit card, numerous items of apparel stained with the victim's blood and a receipt for a $2,500 cheque made out to the accused. The police also ascertained that the accused was the registered owner of a 9 mm handgun. He was subsequently arrested at an airport about to board a plane for London, England. The accused was Chartered and cautioned, taken to a holding centre and given the opportunity to phone a lawyer. After meeting with his lawyer for about an hour, the accused was moved to a small, windowless interrogation room with two chairs and a small table where he met with a detective. The accused said he did not want to talk without his lawyer being present but, without much prompting, went on to give exculpatory evidence. He then again said he did not want to answer any more questions without his lawyer. Questioning stopped and after a half hour dinner break, the detective changed tactics for the interview.

The detective said he was convinced that the accused had executed the victim in the basement of the victim's house. He began to confront the accused with the evidence the police had already gathered linking him to the murder. His chair was reasonably close to the accused and the detective occasionally placed his hand on the accused's knee in what would seem to be a gesture of intimacy and understanding. The detective advised the accused that the evidence against him was overwhelming and exhorted him to tell why someone who was not a criminal would have shot the victim, forged one of his cheques and stolen his credit card – using the card later to buy three airline tickets to London. When this failed to produce a confession, the detective became more aggressive. He moved his chair closer to the accused and called him greedy. He began tapping the accused on the knee from time to time. For the most part, the accused had remained mute and invoked his right to silence, saying that on his lawyer's advice he would not answer further questions. The detective said he was not asking questions and continued to talk, confronting the accused with evidence. After a short pause the accused began to confess, ultimately admitting to shooting the victim.

Alberta Court of Queen's Bench

At trial the accused argued, among other things, that his right to silence under s. 7 of the *Charter* was breached and, therefore, his confession was not voluntary. He contended that during the second half of the interview - after the dinner break - the detective created an atmosphere of oppression by, among other things, moving his chair closer to him and repeatedly tapping his thigh. The trial judge twice reviewed the video tape of the interview and concluded the detective, although persistent, was not threatening, hostile or intimidating. The judge ruled that the Crown had proven beyond a reasonable doubt that the accused's statements and confession were voluntary. Thus, there was no breach of the accused's s. 7 right to silence and the statements were admissible. A jury found the accused guilty of second degree murder.

Alberta Court of Appeal

The accused appealed his conviction suggesting, among other grounds, that the trial judge made an error by misapprehending the evidence concerning the physical force applied by police. The accused submitted that the physical contact by the police was more than mere "body language," as characterized by the trial judge, and consisted of the continuous poking of his leg during the aggressive phase of the interview, as well as a shake of his body when he was looking away. In his view, the detective's conduct "took on the character of assaulting a detainee" and the physical contact to gain his attention during questioning interfered with his constitutional right to remain silent. The poking and touching were uninvited, nor did he consent to either. In his opinion, the constant physical contact was designed to make it difficult, if not impossible, for him to ignore the questions and to escape the relentless onslaught of his interrogator. He acknowledged that the detective did not use "violent" physical force but a lesser form of physical force that constituted a continuous series of assaults

upon his person that created oppressive circumstances which, together with the persistent and relentless interrogation, broke his will so that he was induced to make an involuntary confession. He submitted, as well, that his right to remain silent was effectively overcome by the physical contact so that he could not ignore the questions or otherwise be inattentive to them.

Although the physical touching went beyond mere "body language" - the term used by the trial judge to describe the contact - a majority of the Alberta Court of Appeal concluded that the persistent questioning and touching of the accused's body by the police officer did not overbear his ability to exercise his free will and deprive him of a meaningful choice as to whether or not to speak to the police:

> Here the trial judge heard [the detective's]' evidence and watched the video of the interview twice. She concluded that the confession was voluntary, because the conduct of the police did not exceed the bounds of reasonable persuasion, and that the [accused] had chosen, through the exercise of an operating mind, to speak to the police. We have also viewed the video. We are not persuaded the trial judge erred in her assessment of the police conduct and the voluntariness of the confession. [The detective] did place his hand upon the wrist, knee and thigh of the [accused] from time to time during the questioning. The touching, for the most part, was properly characterized by both defence counsel at trial, and by the trial judge, as "tapping", in an apparent effort to concentrate the [accused's] attention, and in some instances as a seeming expression of the officer's concern. The [accused] showed no signs of discomfort with the touching; he made no attempt to push the detective's hand away, nor did he ask that the touching cease. From an objective standpoint, the touching was not offensive nor intimidating, and the [accused] did not give evidence of any subjective feelings to the contrary. The touching could properly be described as conversational touching, which in ordinary human discourse would not be characterized as an assault. Each case will, of course, be fact-specific, and the degree of any touching and the reaction to it will be relevant. Our conclusion should not be construed as a condonation of physical assault as a legitimate means of persuasion. [para. 42]

The accused's right to remain silent was not breached and the confession was admissible. The accused's appeal was dismissed and his conviction upheld.

Complete case available at www.albertacourts.ab.ca

UNKNOWNS JUSTIFY BRIEF & FOCUSSED HARD ENTRY

R. v. MacKay, 2012 ONCA 671

Canada Border Services officers opened a package addressed to the accused and discovered four wooden statues containing hidden rough diamonds. The police obtained a general warrant authorizing the installation of an alarm and a tracking device in the package so that investigators would know when the package was opened. A controlled delivery of the package using an undercover officer posing as a courier was made. The police decided to use its Emergency Response Team (ERT) due to two perceived security concerns:

1. Investigators were unable to conclusively identify the accused before the raid, precluding a complete threat assessment, and

2. The accused's office was located in a high rise commercial building in the hub of Toronto's jewellery district. Police knew that jewellers typically operated from offices equipped with controlled access doors, closed circuit security monitoring, and other security measures. Because of the potential high value of the diamonds, police were also concerned about the presence of weapons.

About 10 minutes after the package was delivered, police received notification that it had been opened. The undercover officer immediately returned to the office, claiming to have forgotten her gloves. She was buzzed through the outer door of the office. ERT, with weapons drawn, then breached the inner door and secured the premises. The accused was

arrested and ERT left the premises seven minutes after entry. The two-room office suite was searched and police seized 54 diamonds valued at about $12,900. The accused was charged with importing diamonds contrary to the *Export and Import of Rough Diamonds Act* and acquiring illegally imported goods and smuggling contrary to the *Customs Act*.

Ontario Court of Justice

At trial the judge concluded that the police planning and threat assessment for the warrant's execution was reasonable. "The officers took all, in my view, appropriate and reasonable steps to ensure that the search proposed to be conducted would be effective and not dangerous to any persons involved, including the officers and the defendant and any other person who might be in the vicinity at the time of the search," said the judge. "The officers' original concerns were well founded and I do not fault the preparation that they took prior to the search being executed." However, the judge found the manner in which the warrant was executed to be unreasonable. The entry of ERT members, each armed with two loaded firearms, was an unnecessary "show of significant arms." In the judge's view, the undercover officer could have simply approached the accused with the ERT show of force in the background, behind her at the doorway, to ensure that there was no difficulty with the arrest. The search was ruled unreasonable under s.8 of the *Charter*, the evidence was excluded and the accused was acquitted.

Ontario Superior Court of Justice

A Crown appeal was successful. Since the police threat assessment was well-founded and the presence of the ERT was reasonable, the trial judge's finding that a "show of force in the background" would have been adequate amounted to speculative second-guessing in hindsight. The appeal judge found the trial judge was judging dynamic operational decisions made by the police with the benefit of hindsight and the determination that the precise placement of the officers was excessive amounted to an impermissible after-the-fact assessment. The accused's acquittals were quashed and a new trial was ordered.

Ontario Court of Appeal

The accused then appealed, suggesting the acquittals be reinstated. He did not challenge the initial police decision to deploy ERT in the raid on his office but asserted that the police had a duty to reassess the situation after the undercover officer entered the premises the first time which should have led to a decision to downgrade the "hard entry" nature of the raid to the point that the ERT would play a back-up role to regular police officers. But, as Justice MacPherson noted, the parameters for judicial review on the powers of a police tactical unit making a "hard entry" include the following propositions from *R. v. Cornell*, 2010 SCC 31:

- The decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be. Just as the Crown cannot rely on after-the-fact justifications for the search, the decision about how to conduct it cannot be attacked on the basis of circumstances that were not reasonably known to the police at the time. Whether there existed reasonable grounds for concern about safety or destruction of evidence must not be viewed "through the 'lens of hindsight'";

- The police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require. It is often said of security measures that, if

"Given the many unknowns, particularly the possibility of weapons inside the premises, there is no basis for concluding that the ERT 'hard entry' in this case – brief and focussed – amounted to an unreasonable search."

> something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.

In this case, the trial judge erred in respect to both of these propositions. Even after the undercover officer had been inside the accused's office, information critical to the imminent raid remained unknown, including: the size of the office, the number of rooms, the number of people inside and whether anyone inside had access to weapons. There was nothing in the undercover officer's brief visit to the premises to remove the extremely important concern about the presence of weapons. "Given the many unknowns, particularly the possibility of weapons inside the premises, there is no basis for concluding that the ERT 'hard entry' in this case – brief and focussed – amounted to an unreasonable search," said Justice MacPherson. There was no *Charter* breach, the accused's appeal was dismissed and the order of a new trial was confirmed.

Complete case available at www.ontariocourts.on.ca

"The relationship between debtors and creditors is common to both licit and illicit commerce. Debtors owe. Debtors are expected to pay. Creditors are owed. Creditors expect to be paid.

Some debtors pay their debts on time and in full. Others lag behind and require reminder or encouragement to discharge their obligations. The methods used to remind debtors of their obligations and to encourage repayment vary. Some follow conventional methods. Others take different approaches.

In this case, some drug purchasers fell behind in their payments to their suppliers. To remind them of their indebtedness and to encourage repayment, their suppliers shunned dunning letters and threats of litigation in favour of a more direct approach: a baton and a handgun."

Ontario Court of Appeal Justice Watt - *R. v. Pelletier,* 2012 ONCA 566

'REALISTIC RISK' AN ESSENTIAL ELEMENT OF 'CARE OR CONTROL'

R. v. Boudreault, 2012 SCC 56

The accused, inebriated and unfit to drive, decided to leave the apartment of a lady that he met earlier at a bar. He had her call for a taxi and it was expected that two drivers would attend — one to take him home and the other to drive his vehicle. He left the apartment into minus 15 degrees Celsius weather with blowing wind at 40 km/h. He got into his truck — which was in a private driveway, on level terrain, its automatic transmission set to park — started the engine, turned on the heat and fell asleep. The taxi driver arrived about 45 minutes after the first call and saw the accused sleeping in the driver's seat. Instead of waking him, the driver called police. The accused's ability to drive was manifestly impaired, he was arrested and subsequently provided two breathalyzer test samples of 250mg% and 242mg%. He was charged with impaired care or control and over 80mg% under s. 253(1) of the *Criminal Code*.

Court of Quebec

The trial judge held that there was no risk of the accused putting the motor vehicle in motion and therefore care or control within the meaning of s. 253(1) had not been established. Although the accused was intoxicated, he knew what he was doing, took all the necessary precautions and had a concrete and reliable plan to get home without driving, which was thwarted when the very taxi driver he had been summoned called the police. The accused was acquitted of both counts.

Quebec Court of Appeal

The Crown's appeal was allowed. The Court of Appeal considered that an intention to drive was not an essential element to impaired care or control and the trial judge had therefore erred in considering a lack of intention to drive as proof that there was no risk of setting the vehicle in motion. In it's view, "there was such a risk given the [accused's] advanced state of intoxication, since his blood alcohol level was more than three times the legal limit and this might have greatly affected his judgment had he woken up". Convictions were entered.

Supreme Court of Canada

The accused then appealed to Canada's Supreme Court. The Crown submitted that a risk of danger was not an essential element of the offence of care or control under s. 253(1) of the *Criminal Code*. In its view, even where the presumption of "care or control" under s. 258(1)(a) is not engaged, the Crown suggested it only needed to prove the voluntary consumption of alcohol beyond the legal limit or leading to impairment and "some use of the car or its fittings and equipment." Justice Fish, speaking for himself and five other justices, however, disagreed. In his view, a realistic risk of danger is an essential element of "care or control" under s. 253(1).

Risk of danger?

Justice Fish noted that Parliament's objective in enacting s. 253 was "to prevent a risk of danger to public safety." Thus, an accused's "conduct that presents no such risk falls outside the intended reach of the offence" because Parliament's intention was to criminalize only conduct that creates a realistic risk of danger.

The essential elements of "care or control" under s. 253(1) are:

1. an intentional course of conduct associated with a motor vehicle;
2. by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit;
3. in circumstances that create a realistic risk of danger to persons or property.

As noted, this risk of danger must be realistic and not just theoretically or remotely possible. However, the level of risk need not be probable, or even serious or substantial. Justice Fish stated:

> To require that the risk be "realistic" is to establish a low threshold consistent with Parliament's intention to prevent a danger to public safety. To require only that the risk be "theoretically possible" is to adopt too low a threshold since it would criminalize unnecessarily a broad range of benign and inconsequential conduct. [para. 35]

And further:

> A realistic risk that the vehicle will be set in motion obviously constitutes a realistic risk of danger. Accordingly, an intention to set the vehicle in motion suffices in itself to create the risk of danger contemplated by the offence of care or control. On the other hand, an accused who satisfies the court that he or she had no intention to set the vehicle in motion will not necessarily escape conviction: An inebriated individual who is found behind the wheel and has a present ability to set the vehicle in motion — without intending at that moment to do so — may nevertheless present a realistic risk of danger.
>
> In the absence of a contemporaneous intention to drive, a realistic risk of danger may arise in at least three ways. First, an inebriated person who initially does not intend to drive may later, while still impaired, change his or her mind and proceed to do so; second, an inebriated person behind the wheel may unintentionally set the vehicle in motion; and third, through negligence, bad judgment or otherwise, a stationary or inoperable vehicle may endanger persons or property. [paras. 41-42]

The six member majority held that "anyone found inebriated and behind the wheel with a present ability to drive will — and should — almost invariably be convicted." However, a conviction will not be "automatic" unless a realistic risk of danger (which is a finding of fact), in the particular circumstances of the case, is established by the Crown. This is a low threshold which will normally be established by impairment or an excessive blood alcohol ratio behind the wheel of a motor vehicle with nothing to stop an accused from setting it in motion, either intentionally or accidentally. Then, to avoid conviction, an accused will in practice face a tactical necessity of adducing credible and reliable evidence tending to prove that the inherent risk of danger is not a realistic risk in the particular circumstances of the case. For example, an accused may escape conviction "by adducing evidence that the motor vehicle was inoperable or, on account of its location or placement, could, under no reasonably conceivable circumstances, pose a risk of danger. Likewise, use of the vehicle for a manifestly innocent purpose should not attract the stigma of a criminal conviction."

Alternate Plan

In this case, the accused had an "alternate plan" to ensure his safe transportation home. The affect an alternate plan has on the risk involved depends on two considerations. First, whether the accused's plan was objectively concrete and reliable. And second, was the plan in fact implemented by the accused. Justice Fish continued:

> A plan may seem watertight, but the accused's level of impairment, demeanour or actions may demonstrate that there was nevertheless a realistic risk that the plan would be abandoned before its implementation. Where judgment is impaired by alcohol, it cannot be lightly assumed that the actions of the accused when behind the wheel will accord with his or her intentions either then or afterward.
>
> For example, even where it is certain that the taxi will show up at some point, if the accused occupied the driver's seat without a valid excuse or reasonable explanation, this alone may

"[C]are or control", within the meaning of s. 253(1) of the Criminal Code, signifies (1) an intentional course of conduct associated with a motor vehicle; (2) by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit; (3) in circumstances that create a realistic risk, as opposed to a remote possibility, of danger to persons or property.

> persuade the judge that "his judgment [was] so impaired that he [could not] foresee the possible consequences of his actions". The converse, however, is not necessarily true. Even where it is probable that the taxi will appear at some point and the accused occupied the driver's seat with a valid excuse or reasonable explanation, the trial judge may nonetheless be satisfied beyond a reasonable doubt that there remained a realistic risk of danger in the circumstances. [reference omitted, paras. 52-53]

In this case, the Crown only alleged that the accused would, at some point, intentionally set his vehicle in motion thereby causing a risk of danger. The trial judge applied the correct legal test to the evidence and concluded there was no risk that the accused would at any point intentionally set the vehicle in motion. He also correctly recognized that the absence of an intention to drive was only relevant to rebutting the presumption in s. 258(1)(a) and that a risk of danger was an essential element of care or control. Even if the trial judge's findings of fact were viewed unsatisfactory or unreasonable to others, these findings were not reviewable on the Crown's appeal. The accused's appeal was allowed, the judgment of the Quebec Court of Appeal was set aside and the acquittals were restored.

A Different View

Justice Cromwell, delivering a dissenting judgment, was of the opinion that a risk of danger, whether realistic or otherwise, was not an element of the offence of care or control. He found that such an interpretation would seriously undercut the provision's preventive purpose. In his view, a person "is in care or control of a motor vehicle when one acts to assume the present ability to operate the vehicle or has its superintendence or management." Finally, even if the creation of a risk was an essential element of the offence, Justice Cromwell concluded that the trial judge erred in law by finding that it had not been proven in this case. He would have dismissed the accused's appeal.

Complete case available at www.scc-csc.gc.ca

'CARE or CONTROL' under s. 253(1) of the *Criminal Code* requires (1) an intentional course of conduct associated with a motor vehicle; (2) by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit; (3) in circumstances that create a realistic risk of danger to persons or property. There are two ways the Crown can prove this.

Presumptive Care or Control	Non-Presumptive (Actual or De Facto) Care or Control
• s. 258(1)(a) of the *Criminal Code* creates a legal presumption which provides that an accused who was found in the driver's seat of a motor vehicle "shall be deemed to have had the care or control of the vehicle . . . unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle . . . in motion . . ." • This reverse onus provision can be rebutted if the accused establishes they had no intention to drive. • An inebriated person found behind the wheel cannot be convicted of care or control if that person satisfies the court that he or she had no intention to set the vehicle in motion. • If the presumption is rebutted, care or control can nonetheless be established by proving non-presumptive care or control.	• An intention to drive is not an essential element of the offence. • There must be a realistic risk of danger to persons or property. This is a low threshold which is more than a theoretical or remote possibility, but less than a probable, serious or substantial risk. • An intention to set the vehicle in motion is sufficient in itself to create a realistic risk of danger. • A realistic risk of danger may also arise when: 1. an inebriated person who initially does not intend to drive may later, while still impaired, change his or her mind and proceed to do so; 2. an inebriated person behind the wheel may unintentionally set the vehicle in motion; or 3. through negligence, bad judgment or otherwise, a stationary or inoperable vehicle may endanger persons or property.

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British Columbia Association of Chiefs of Police

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Speakers

Rick Mercer chronicles, satirizes and ultimately celebrates all that is great and irreverent about this country. Known as "Canada's Unofficial Opposition," Mercer is our most popular comic, a political satirist who knows exactly what matters to regular Canadians and what makes them laugh. Born in St. John's, Newfoundland, Mercer has won over 25 Gemini Awards.

Assembly of First Nations National Chief **Shawn A-in-chut Atleo** is a Hereditary Chief from the Ahousaht First Nation. In July 2009, Atleo was elected to a three-year mandate as National Chief to the Assembly of First Nations. Atleo has been a tireless advocate for First Nations by spending time in First Nations in every region of the country.

Craig Kielburger co-founded, with his brother **Marc**, Free The Children in 1995 at only 12 years of age. Today, he remains a passionate full-time volunteer for the organization, now an international charity and renowned educational partner that empowers youth to achieve their fullest potential as agents of change.

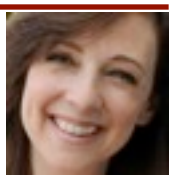
Wendy Mesley is a regular contributor to CBC News: The National, CBC Television's flagship news program, appearing throughout the week in a regular segment that asks provocative questions about the news stories Canadians are talking about. She also contributes to CBC News: Marketplace, CBC Television's award-winning prime-time investigative consumer show.

Richard Rosenthal was appointed BC's first Chief Civilian Director of the Independent Investigations Office on January 9, 2012. He has extensive experience in civilian oversight of law enforcement having served for 15 years as deputy district attorney for Los Angeles County, where he worked on various assignments.

Ian McPherson is a Partner, Advisory Services with KPMG in Toronto and the former Assistant Commissioner of Territorial Policing at the Metropolitan Police Service in London, UK. Ian is with KPMG's Global Centre of Excellence for Justice and Security, leading its work throughout North America.

Major-General (ret'd) **Lewis MacKenzie** is considered the most experienced peacekeeper on the planet. MacKenzie has commanded troops from dozens of countries in some of the world's most dangerous places. In Sarajevo, during the Bosnian Civil War, he famously managed to open the Sarajevo airport for the delivery of humanitarian aid.

Dr. John Izzo has devoted his life and career to helping leaders create workplaces that bring out the best in people, plus discover more purpose and fulfillment in life and work. For over 20 years, he has pioneered employee engagement, helping organizations create great corporate cultures and leading brands through transformations that create both customer and employee loyalty.



In an increasingly social world, **Susan Cain** shifts our focus to help us reconsider the role of introverts - outlining their many strengths and vital contributions. Like *A Whole New Mind and Stumbling on Happiness*, Cain's book, *Quiet: The Power of Introverts In a World That Can't Stop Talking*, is a paradigm-changing lodestar that shows how dramatically our culture has come to misunderstand and undervalue introverts.

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For detailed requirements please visit the JIBC Website.

Justice Institute of British Columbia, Canada | www.jibc.ca |graduatestudies@jibc.ca

JIBC

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(students enrolled in either graduate certificate are required to complete the foundational courses)

Intelligence Theories and Applications

A survey course that introduces the student to the discipline of intelligence and provides the student with an understanding of how intelligence systems function, how they fit within the policymaking systems of free societies, and how they are managed and controlled. The course will integrate intelligence theory with the methodology and processes that evolved over time to assist the intelligence professional. The course will develop in the student a range of advanced research and thinking skills fundamental to the intelligence analysis process.

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The skill most appreciated by the intelligence consumer is the ability to communicate, briefly and effectively, the results of detailed analytic work. This course, through repetitive application of a focused set of skills to a body of information of constantly increasing complexity, is designed to prepare intelligence analysts to deliver a variety of intelligence products in both written and oral formats.

Advanced Analytical Techniques

Topics include: drug/terrorism/other intelligence issues, advanced analytic techniques (including strategic analysis, predicative intelligence etc.), collection management, intelligence sources, management theory (large organizations), attacking criminal organizations, crisis management, negotiation techniques, strategic planning, local/regional updates and briefing techniques.

Specialized Courses

(students enrolled in either graduate certificate are required to complete the foundational courses)

Intelligence Analysis

Competitive Intelligence
This course explores the business processes involved in providing foreknowledge of the competitive environment; the prelude to action and decision. The course focuses on supporting decisions with predictive insights derived from intelligence gathering practices and methodologies used in the private sector. Lectures, discussions, and projects focus on the desires and expectations of business decision-makers to gain first-mover advantage and act more quickly than the competition.

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This course is an introduction to law enforcement terminology, practices, concepts, analysis, and intelligence. The course will introduce the student to the discipline of crime analysis and law enforcement intelligence through the study of the intelligence cycle and the intelligence determinants. The role and responsibilities of an analyst within each sub-topic will be addressed. Additionally, the utilization of analytical software will be introduced.

Analytical Methodologies for Tactical Criminal Intelligence
The course reviews the key requirements for intelligence in law enforcement and homeland security. The course focuses the use of advanced analytic methodologies to analyze structured and unstructured law enforcement data produced by all source collection. Students will apply these concepts, using a variety of tools, to develop descriptive, explanatory, and estimative products and briefings for decision-makers in the field.

The BC LAW ENFORCEMENT DIVERSITY NETWORK

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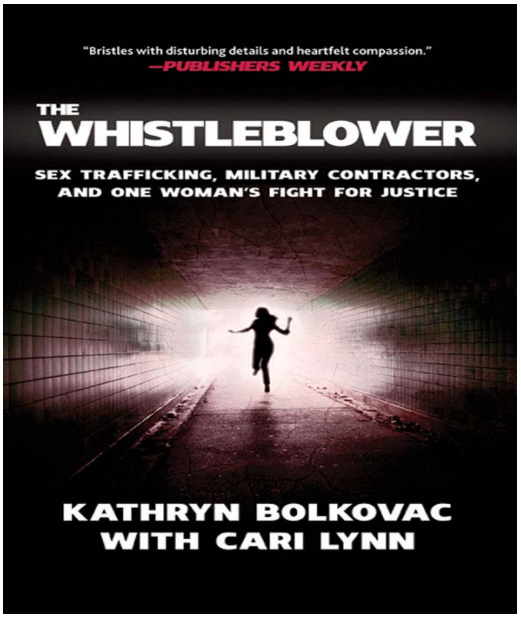

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The BC Law Enforcement Diversity Network is a sub-committee of the British Columbia Association of Chiefs of Police